Supreme Court, U.S.
FILED
MAR 16 1993
OFFICE OF THE CLERK

No. 92-1180

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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We have explained in the petition that the Ninth Circuit seriously erred in holding that the Due Process Clause required prior notice and an opportunity for a hearing before the premises at issue here could be seized for civil forfeiture, even though the seizure was made pursuant to a warrant issued by a neutral and detached magistrate. The Ninth Circuit likewise erred in holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed—even if it is brought within the five-year limitations period in 19 U.S.C. 1621—if government officials did not act with what the court regards to be sufficient haste in carrying out internal reporting and suit-filing duties. Both of those holdings warrant review by this Court.

1. a. Respondent's attempt (Br. in Opp. 12-13) to minimize the circuit conflict on the due process issue is without merit. The court of appeals specifically acknowledged that circuit conflict, pointing out that the Eleventh Circuit had reached the "opposite conclusion" in *United States* v. *A Single Family Residence*, 803 F.2d 625, 631-632 (1986). Pet. App. 15a; see also *United States* v. *Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1264 (2d Cir. 1989) (acknowledging contrary holding in *A Single Family Residence*). Although respondent tries to distinguish *A Single Family Residence* on the ground that the house there was owned by a corporation, the Eleventh Circuit did not rely on (or even mention) that fact in its due process discussion. Instead, the Eleventh Circuit correctly stated a categorical rule that due process does not require prior notice and opportunity for a hearing when property is seized for forfeiture. See 803 F.2d at 631-632; accord *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1561-1562 (11th Cir. 1988) (reiterating holding of *A Single Family Residence* without attaching significance to nature of property or owner). Although respondent relies in this case on claimant Good's interest in his "home," Good was not residing on the forfeited premises when they were seized; he had leased the premises to tenants. His interest as lessor was no different from that of the corporate owner in *A Single Family Residence*.

b. Respondent ignores the fact that the court of appeals has essentially held unconstitutional the Act of Congress that authorizes seizures of property subject to forfeiture pursuant to a warrant issued "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure," 21 U.S.C. 881(b)—*i.e.*, based on a magistrate's ex parte finding of probable cause. See Fed. R. Crim. P. 41. A holding that an Act of

Congress is unconstitutional is particularly worthy of review by this Court.

c. Respondent's attempt (Br. in Opp. 7-11) to defend the Ninth Circuit's due process ruling on the merits is unavailing. Respondent principally relies (Br. in Opp. 7-9) on *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972), and the three-part test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), in arguing that a finding of probable cause by a magistrate is insufficient and that due process requires prior notice and opportunity for an adversary hearing before real property (or at least a residence) is seized. That argument overlooks the fact that this Court has already held that "seizure for purposes of forfeiture is one of those '"extraordinary situations" that justify postponing notice and opportunity for a hearing.'" *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677 (1974) (quoting *Fuentes* v. *Shevin*, 407 U.S. at 90). Here, as in *Calero-Toledo*, seizure furnishes a basis for the government "to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." 416 U.S. at 679 (footnote omitted); see also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 557 (1992). Moreover, "unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, [government] officials determine whether seizure is appropriate under the provisions of the [federal] statutes." 416 U.S. at 679.[1]

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[1] These factors also distinguish *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991), on which respondent relies (Br. in Opp. 8). Moreover, unlike in *Doehr*, where the plaintiff had no interest in the real estate when he sought the attachment (see 111 S. Ct. at 2115), the United States here had an interest in the property itself as a result of Good's use of it to commit a drug offense.

Respondent seeks to distinguish *Calero-Toledo* on the ground that the property there was moveable, while here it was not. See Br. in Opp. 10-11. In *Calero-Toledo*, however, the Court simply identified, as the third of the three relevant factors, that "preseizure notice and hearing might frustrate the interests served by the [forfeiture] statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. The Court did not suggest that it was necessary to show that the property would be removed in order to justify seizure without prior notice and hearing; it simply observed that property subject to forfeiture "will often be of a sort" that raises those concerns. The Court thus stated a categorical rule, based on the characteristics of forfeited property generally. Moreover, the Court in *Calero-Toledo* referred not only to the possibility of removal of the property, but also to the possibility that the property could be "destroyed" or "concealed." Those risks are present here, because a residence can be "destroyed," and its contents (which may also be subject to forfeiture if used in a drug transaction) can be "concealed."

Finally, claimant Good was not personally ousted from possession of the premises when they were seized; he had leased the premises to others and resided elsewhere. Nor were the tenants evicted; as respondent concedes (Br. in Opp. 3), they were permitted to remain under an occupancy agreement. Compare *United States* v. *A Parcel of Land, Building, Appurtenances, and Improvements, Known as 92 Buena Vista Avenue*, No. 91-781 (Feb. 24, 1993), slip op. 2 n.3 (plurality opinion of Justice Stevens). Given the limited nature of the deprivation, it was especially inappropriate for the court

of appeals to impose a prior notice and hearing requirement.

2. Respondent likewise fails in his defense of the court of appeals' holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed if it is not, in the court's view, instituted "promptly." The relevant statute of limitations, 19 U.S.C. 1621, specifically provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture * * * shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." Section 1621 plainly *does* confer a right on a claimant to have a suit dismissed if it is filed outside the five-year period, because the statute specifically provides that no such suit may be brought. By contrast, although 19 U.S.C. 1602-1604 impose what the court below characterized as "internal" requirements (see Pet. App. 5a) on government agents regarding prompt investigation, reporting, and filing of lawsuits, they do not specify any remedy or consequence if those internal standards are not met in a given case. In particular, nothing in 19 U.S.C. 1602-1604 suggests that an otherwise timely forfeiture action must be dismissed if a government employee fails to satisfy a vague standard of promptness in carrying out his duties.

In support of a rule of dismissal, respondent cites (Br. in Opp. 17) only several state cases in which forfeiture actions were dismissed because they were not filed within the time allowed by state law. Respondent entirely ignores the decisions of this Court, cited in our petition (at 20), that announce quite different principles for construing similar provisions in *federal* statutes. See *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716-722 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986). As the Court reiterated in *Montalvo-Murillo*, "many statutory requisitions intended for the guide of

officers in the conduct of [the] business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual." 495 U.S. at 717-718 (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). For that reason, federal statutory provisions, such as those on which respondent relies, must be construed to conform to the "great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." 495 U.S. at 718 (quoting *Pierce County*, 476 U.S. at 260). Accordingly, here, as in *Montalvo-Murillo* and *Pierce County*, the failure to comply with the internal timeliness standards (if the district court should find such a failure on remand) does not foreclose the government from proceeding with the case. In fact, the Court specifically concluded in *United States* v. *$8,850*, 461 U.S. 555, 563 n.13 (1983), that it could not read into the statutory scheme governing forfeitures a short statute of limitations, "since 19 U.S.C. § 1621 (1976 ed., Supp. V) expressly allows the Government to bring a civil forfeiture proceeding within five years."[2]

* * * * *

[2] Contrary to respondent's contention (Br. in Opp. 14-15), this holding in *$8,850* is unaffected by the fact that Congress amended 19 U.S.C. 1603 to insert the word "promptly" after the seizure and forfeiture at issue in that case. There already were similar time requirements in 19 U.S.C. 1602 and 1604, and the Court concluded that they did not operate as judicially enforceable limitations periods, since 19 U.S.C. 1621 furnishes an express statute of limitations. Congress's subsequent insertion of a parallel time requirement in 19 U.S.C. 1603 does not alter the Court's conclusion that 19 U.S.C. 1621 furnishes the only judicially enforceable limitations period under the forfeiture statutes.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1993